OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 15-05 March 18, 2015

TO: All Division Heads, Regional Directors, Officers-in-Charge, and Resident Officers

FROM: Richard F. Griffin, Jr., General Counsel

SUBJECT: Report on the Midwinter Meeting of the ABA Practice and Procedure Committee of the Labor and Employment Law Section

In early March, I attended the Annual Midwinter meeting of the Practice and Procedure Committee (P & P Committee) of the ABA Labor and Employment Law Section together with several senior Agency managers. As in years past, a primary purpose of this meeting was to respond to and discuss Committee concerns and questions about Agency casehandling processes. As prior General Counsels have done, I am sharing the P & P Committee members' concerns and the Agency's responses with you so that you can have the benefit of this important exchange. While we did not have time to respond to every question raised at the meeting, we have included all the questions posed to me and my responses.

During my tenure as General Counsel, it is my intention to conduct the business of the Office of the General Counsel in a productive manner. Continuing a constructive, cooperative relationship with the organized Bar is an important element of this objective and one to which I am committed. At the Midwinter meeting, members of the Committee stated their appreciation of the constructive relationships enjoyed by members of many local P&P groups with individual Regional Directors. I encourage you to facilitate those exchanges where they do not exist and to continue and broaden those relationships where they do. Open communication with representatives of both management and labor who appear before us enhances the performance of our mission and benefits the public we serve.

Attachment
Release to the Public

cc: NLRBU
NLRBPA

I. Unfair Labor Practice Issues

A. Statistics

1. Please provide the number of ULP charges filed, the settlement rate, the number of complaints issued, the litigation win rate, the number and type of cases sent to the Division of Advice, and the average length of time a case remains in the Division of Advice:

In FY 2014, there were 20,415 unfair labor practice (ULP) charges filed with 35.2% found meritorious, the settlement rate was 93.4%, the number of complaints issued was 1216, and the litigation success rate before ALJs and the Board (ULP and compliance cases) was 85%.

As to the Division of Advice, there were 540 submissions by Regions. The Division of Advice does not keep statistics regarding average case pending time; however, the median case-processing time was 20 days. The submitted cases involved novel and/or complex legal issues, high-profile labor disputes, nationwide issues, and Section 10(j) injunctive relief authorization requests. A few of the key and/or recurring issues included: whether a successor that intends to retain all the predecessor employees should have an obligation to bargain with the union before setting initial terms of employment, regardless of what it had communicated to employees; what suffices for purposes of good faith pre-discipline bargaining in a represented unit where a collective-bargaining agreement or interim measure has not yet been agreed upon and whether the employer has demonstrated "exigent circumstances" that permitted unilateral discipline; whether the Board should return to its traditional, joint employer standard under which an entity could be a joint employer where "industrial realities" made it essential to meaningful bargaining; and whether the employer has a duty to furnish financial information to the union in circumstances where it has not made an "inability to pay" claim under the Board's current test.

2. Please provide the same statistics for cases which involve a claim of interference with Section 7 rights, including social media and handbook cases, where no union is involved. How do these numbers compare to prior years? If possible, please also break down the statistics by the nature of the issue (e.g., Facebook posting, *D.R. Horton* issue, confidentiality policy, etc.).

The Agency does not currently have a procedure in place to track this specific information. However, our Office of the Chief Information Officer (OCIO) is assisting with metatagging this sort of information in our case management system and, once that process is complete, the Agency should be able to provide some of these types of statistics.

3. Does the Board keep any statistics on the number of cases in which the default language is triggered? If so, please provide.

The Board does not keep specific statistics on the number of cases in which the default language is triggered. In FY 2014, there were 10 Motions for Summary Judgment (MSJ) filed as a result of an alleged default in a settlement agreement that included a default provision. Of the 10 MSJs filed, eight were granted, one was denied and one was withdrawn.

4. Can you please provide statistics on pre-arbitral and post-arbitral deferrals, including the number of cases deferred and the length of time the cases have been pending? Does this represent a change from prior years?

The Agency deferred 730 cases during FY 2014. The Agency does not track whether deferral was pre-arbitral or post-arbitral. As of February 11, 2015, 1504 cases remain in deferral status. The median time these cases have been pending in deferral is 288 days. The number of deferred cases remains about the same as reported to the P&P last year.

5. Can you please share statistics concerning the use of investigative subpoenas to obtain testimony and documents, the frequency of petitions to revoke and the success of such petitions? Can you break down the statistics as between subpoenas directed at parties and non-parties?

During FY 2014, Regions issued 1,181 investigative subpoenas (735 subpoenas ad testificandum and 446 subpoenas duces tecum) in 576 cases. The Agency's case management system does not distinguish between investigative subpoenas and trial subpoenas in reporting petitions to revoke. During FY 2014, the Board ruled on 82 petitions to revoke -- 68 were denied, one was resolved, two were withdrawn, eight were declared moot, two were closed, and one is pending. The Agency does not keep statistics on whether subpoenas were directed to parties vs. non-parties. However, we are advised that the vast majority of these subpoenas are issued to parties. See also, our response to I.E.1.

6. Do you have statistics on the impact of petitions to revoke on the length of the investigation and the impact of investigative subpoenas on the Regions' merit determinations? If so, please provide.

The Agency does not have data regarding the impact of petitions to revoke on the length of the investigation. However, the issuance of an investigative subpoena along with the filing of a petition to revoke typically lengthens the investigation. When making a decision regarding issuance of investigative subpoenas, the Agency weighs the potential delays against the potential for more informed decision-making resulting from obtaining relevant testimony or documents.

7. Are there statistics on how many settlement agreements or remedial orders contain notice reading remedies? If so, please provide.

The Agency does not currently keep statistics on the content of settlement agreements or remedial orders.

8. Are statistics kept on the number of cases in which a compliance hearing is needed after a Board remedial order has issued? If so, please provide.

During FY 2014, the Agency conducted six compliance hearings.

9. How many dismissed cases were appealed to the Division of Appeals; what percentage of cases were overturned, and what is the average time a case is pending in Appeals?

During FY 2014, the Office of Appeals processed 1,665 cases, 23 (1.4%) were overturned, and the median number of days to process appealed cases was 29 days.

B. **Section 10(j) Injunctions**

1. Please provide statistics concerning the number of 10(j) injunctions requested by the Regions, the number submitted to the Board, the number authorized by the Board and the number granted by the courts.

In FY 2014, the Injunction Litigation Branch (ILB) received 144 10(j) case submissions from Regional offices and the General Counsel sent 39 cases to the Board for authorization, and the Board authorized all of them, except for one, which was withdrawn from Board consideration due to further developments in the case. Of the 38 cases authorized by the Board, three cases were withdrawn or not filed due to developments in the case, seven were pending at the end of the fiscal year, 17 were settled/adjusted, and 11 were litigated with 9 full wins and 2 partial wins, resulting in a litigation success rate of 100%.[1]

Please also provide statistics regarding the average time between filing of the charge, when the Region submits a request to Advice, when the Region makes a determination to issue a complaint, when the complaint is filed, when the case is filed in federal court, and the date of any injunction determination.

[1] However, we note that five of the cases that were pending at the close of the fiscal year resolved after the close of the fiscal year, with 3 wins, 1 loss, and 1 settlement, and one earlier win was overturned by a court of appeals.

For FY 2014 cases, in which Regions submitted "go" 10(j) recommendations, the statistics are:

Filing of Charge to:	# of Median Days
Regional Determination	74
Issuance of Complaint	108
Submission to Advice	181
Filing in Federal Court	207
Injunction Determination	220

2. Please describe any trends and/or novel issues presented in 10(j) cases this past year.

The General Counsel sought injunctions this past year in a wide range of contexts, including to remedy discharges that occurred during an organizing campaign, egregious violations that precluded the holding of a fair election (obtaining interim *Gissel* bargaining orders), successor failures to hire and/or bargain, transfer of unit work to a non-union alter ego to avoid a bargaining obligation, and surface bargaining and/or other misconduct occurring during the initial year of a union's certification. There were no observable trends or recurring novel issues.

3. Please provide further explanation/clarification on the training program discussed in General Counsel Memorandum GC 14-03 and describe the guidance to the Regions if any, regarding the 10(j) program.

Memorandum GC 14-03 referred to a program designed to provide the training of field personnel that is necessary to maintain a strong and effective 10(j) program. In connection with that, the ILB created a new training page on the Agency's internal website bringing together in one place the wealth of pre-existing training material: the 10(j) Manual (revised to include updated 10(j) standards for each circuit), the list of 10(j) categories, the investigation checklist for potential 10(j) cases by category, and other helpful instructions and tips. New information on the webpage includes model arguments to support a request for injunctive relief in successor cases and a compilation of sample 10(l) district court papers. A searchable database of hundreds of sample 10(j) district court documents is currently scheduled to go online in mid-March. Shortly thereafter, the ILB and Operations-Management will be holding video-conference sessions with the 10(j) coordinators and Regional management from every Region to share best practices and to ensure that they are aware of the location and nature of all material and resources in order to provide 10(j) training to their respective staffs and to help manage a robust 10(j) program in each of their Regions.

C. **Settlement Issues**

1. What is the policy or suggested practice on negotiating or discussing settlement terms with a Charged Party prior to having discussions with the Charging Party? At last year's Mid-Winter meeting, a suggestion was made to involve the Charging Party earlier in the settlement process. At the time, the General Counsel recognized the importance of consulting with the Charging Party early in the settlement discussions to ensure that the Region is aware of the Charging Party's position on settlement issues. Has there been any formal guidance or instruction given to the Regional Directors in this regard?

The NLRB's Casehandling Manual (CHM) Sections related to settlements have not been changed since last year's response. However, the General Counsel recognizes that, consulting with the Charging Party early in, and throughout, the settlement process to learn and understand its position on settlement is often helpful in resolving charges efficiently and effectively. Thus, following last year's Mid-Winter meeting, the Regions were again encouraged by Headquarters to obtain the Charging Party's input early in the settlement process.

2. What is the policy on enforcing settlement agreement default language where there are different management or union officials and/or different factual circumstances involved in the subsequent alleged violation? Does the default language apply to alleged new violations occurring after Compliance has closed the case?

The Agency does not have a specific policy regarding enforcement of default language in settlement agreements where different management officials or different factual circumstances are involved. A party could certainly argue that enforcement of the default language was inappropriate because the case involved different agents and/or substantially different conduct. The decision on whether to seek a default judgment remains within the Regional Director's discretion.

As a general rule, default provisions apply to violations occurring after a case is closed in compliance, unless the settlement agreement is limited in scope or duration. Memorandum OM 14-48 provides that the Regions have the authority to agree to limit default language to a particular location where the unfair labor practice conduct occurred and to agree to limit the exercise of the General Counsel's rights under the default judgment language to a six-month period after approval of the settlement agreement, when the Region is confident that the chances of default are low.

See also, our response to I.C.4.

3. Are there plans to post formal settlement agreements online?

The Board orders dealing with formal settlement agreements are already on our website and they include all salient facts regarding the agreements. For this reason, the Board does not plan on posting formal settlements online at this time.

4. When and why has default language been eliminated or limited in scope or duration? What, if any, policies or approvals are required for this? What has been the experience since the GC's clarification of the Regional Directors' flexibility and discretion in April 2014? To what extent do ALJs approve or attempt to encourage settlements without the default language?

As you know, after we solicited and received input from a group of labor and management practitioners last year, Operations-Management issued Memorandum OM 14-48 in which the Regional Directors were given more discretion to eliminate or modify default judgment provisions in proposed settlement agreements. More specifically, Memorandum OM 14-48 provides that where a "charged party seeks to eliminate or modify the default judgment language in a settlement prior to a Regional determination, after Regional determination of non-recidivist isolated conduct with only a cease and desist remedy, or prior to complaint issuance where the non-recidivist agrees to fully and efficiently remedy the violations, the Region may exercise its discretion in deciding whether to approve such a settlement."

Memorandum OM 14-48 also provides that the Regions have the authority to agree to limit default language to a particular location where the unfair labor practice conduct occurred when the charged party has more than one facility, and to agree to limit the exercise of the General Counsel's rights under the default judgment language to a six-month period after approval of the settlement agreement when it is confident that the chances of default are low. No approval is required for such a determination.

Except as provided above, Regions are required to contact the Division of Operations-Management for authorization to accept settlement agreements without default language. On occasion, Operations-Management has approved processing settlement agreements without the inclusion of default language.

Since Memorandum OM 14-48's issuance, the Regions have continued to obtain strong settlements, and settlement rates have not been noticeably impacted. For example, the settlement rate in FY 2013 was 93.2% and in FY 2014 was 93.4%.

Lastly, despite our policy that default language should be routinely included in settlement agreements, there have been a handful of situations where ALJs have accepted settlements without default language over the Counsel for General Counsel's objections. In very few of those cases, the General Counsel filed special appeals with the Board, which approved the settlement.

5. What is the current policy on requiring the parties to provide the Regions with non-Board settlement agreements? Will the Board insist on seeing a copy of the settlement agreement before approving the withdrawal of a charge?

CHM Section 10140.1(b) provides that "[i]n order to permit the Regional Office to exercise proper review pursuant to the policy set forth in *Independent Stave Co.*, the Board agent should ordinarily obtain the terms of the non-Board adjustment in writing." In order to ensure that the Agency is complying with its statutory mandate and is acting

in the public interest, Regional Offices should request and review non-Board settlement agreements between private parties before approving related withdrawal requests. In this regard, we balance our role of encouraging private resolution with our role of protecting Section 7 rights.

6. OM 07-27 (issued 12-27-06) provides guidelines for the Regions to approve or reject non-Board settlements. To what extent have the Regions rejected proposed non-Board settlements under these guidelines and *Independent Stave*? On what basis are non-Board settlements most frequently rejected?

The vast majority of proposed non-Board settlements meet the guidelines set forth in Memorandum 0M 07-27 and *Independent Stave*. When they do not, identified deficiencies are generally resolved and withdrawal requests with non-Board settlement agreements are approved. Non-Board settlements are rejected frequently because they contain: waivers of the right to file future unknown claims or to assist co-workers in ULP proceedings; broad confidentiality clauses; overly harsh, ambiguous or overly expansive penalties for breach; or improperly treat backpay awards as something other than wages with interest that must be reported in accordance with the requirements of federal, state, and local tax obligations, including, in particular, making Social Security (FICA) contributions and payroll tax deductions from any wage payments.

7. Are Regional office staff instructed to provide copies of proposed settlement agreements simultaneously to the charging and charged parties?

Regional office staffs are encouraged to work closely with both parties to resolve cases and to share settlement proposals when it will facilitate the settlement process. See our prior response to I.C.1.

8. Are Regional offices routinely instructed to require an employer, as part of its agreement to pay back pay to alleged discriminatees, to withhold properly authorized dues deductions and remit them directly to the union as part of the settlement proceeds?

No. Funds collected by the Region for backpay amounts owed to discriminatees pursuant to settlement agreements are distributed directly to the discriminatees. Regional offices will not deduct and pay out dues payments from a backpay award without a written authorization from the discriminatee for the Region to do so.

D. **Deferral**

1. Are there any new trends or policy changes with respect to deferring cases pre-arbitration and/or deferring to arbitration decisions?

The Board's decision in *Babcock & Wilcox Construction Co.*, 361 NLRB No. 132 (2014), established a stricter standard for deferral to arbitral awards in Section 8(a) (1) and (3)

cases. The new standard places the burden on the party favoring deferral to show that (1) the arbitrator was explicitly authorized to decide the unfair labor practice issue; (2) the arbitrator was presented with and considered the statutory issue, or was prevented from doing so by the party opposing deferral; and (3) Board law reasonably permits the award. The Board also altered the standards for deferral to grievance settlements and for pre-arbitral deferral, consistent with the new standard for post-arbitral deferral. The deferral standard for Section 8(a) (5) cases was not changed. The General Counsel is applying the new standard in appropriate Section 8(a) (1) and (3) cases and has issued detailed guidance in Memorandum GC 15-02.

2. Is there an update on the experience after Babcock & Wilcox? Are deferred cases being sent to Advice?

As noted above, the General Counsel issued Memorandum GC 15-02, which summarizes the *Babcock & Wilcox* decision and provides instructions to the Regional Offices regarding implementation of that decision. The Regional Offices have been provided templates of new *Collyer* letters that will be sent to parties in cases where the *Babcock* standard will apply. There is no requirement that Regions submit to the Division of Advice cases that they intend to *Collyer* defer or cases involving potential deferral to arbitral awards, absent the presentation of novel or complex issues.

3. To what extent are the Regions applying the proposed standards of former Acting General Counsel Solomon in addressing pre-arbitral deferral issues? In the time when the Regions were reviewing cases under both standards, how frequently were the conclusions relative to deferral different?

The General Counsel is no longer applying the standard proposed by former Acting General Counsel Solomon (Memorandum GC 11-05), which differed somewhat from the standard adopted by the Board in *Babcock & Wilcox*. During the time that Regions were reviewing cases under both an *Olin* and GC 11-05 standard, we did not keep statistics as to how frequently the conclusions were different under the two standards.

4. After Babcock & Wilcox, with the requirement for arbitrators to decide ULP issues, has the GC considered or taken a position on production of affidavits if an arbitrator asks for the investigative file?

Subpart K of the Board's Rules and Regulations, Sections 102.117, 102.118, and 102.119 describes the standards for disclosure of documents contained in the Board's files, and the procedures for requesting their production. Since affidavits in open cases are generally immune from the Freedom of Information Act (FOIA) disclosure under Section 102.117 and under FOIA exemptions, a request for their production for a special purpose would be made to the General Counsel pursuant to Section 102.118. Requests under Section 102.118 for permission from the General Counsel to release affidavits to an arbitrator, or to parties in arbitration, will be considered carefully, taking into account all relevant circumstances, including the Board's decision in *Babcock &*

Wilcox. If these requests are made, they will be considered on an individual basis and there is no overall policy at this time for responding to such requests.

5. To what extent has the direction to the Regions to make "arguable merit" determinations resulted in more cases being dismissed rather than deferred under Collyer?

The "arguable merit" standard is not a new requirement. Former General Counsel Nash first identified this requirement in GC Memorandum 73-31, which explained:

"The region should first determine preliminarily whether the allegations of the charge and the evidence submitted by the charging party in support of the charge and any other evidence at hand establish an arguable violation of the Act. If this preliminary determination does not establish such a violation of the Act, i.e., the charge is determined to be frivolous or clearly lacking in merit, the charge should be dismissed in accordance with Section 102.19 of the Board's Rules and Regulations."

Further, Section 10118.1 of the Casehandling Manual, detailing Collyer deferral, has begun with the phrase "Upon a determination of arguable merit" at least since the 2005 edition. See Memorandum OM 05-77 (attaching 2005 version of that Section); see also Memorandum GC 12-01 (citing 2011 version of that Section), as well as the 2015 version of the CHM. Thus, there has been no change to the General Counsel's policy in this regard during the last 30 years. While there was a loosening of those requirements about 20 years ago in light of resource issues, the standard remains in place. We have not observed any change in the number of dismissals under this standard.

6. How are the Regions and Advice treating cases that go through a "joint board" employer-union process in which no written analysis is provided?

With regard to "joint board" arbitration decisions that will be analyzed under the *Olin* standard, deferral will be appropriate where the contractual and statutory issues are factually parallel, the joint board was presented generally with the facts relevant to resolving the statutory issue, and the decision was not clearly repugnant. In Section 8(a)(1) and (3) cases where joint board arbitration decisions will be analyzed under the *Babcock* standard, the party urging deferral will have the burden of proving that the parties authorized the joint board to decide the issue, that the joint board was actually presented with and actually considered the statutory issue, and that Board law reasonably permits the result. We acknowledge that this may be more difficult in a situation where there is not a written decision.

E. <u>Investigative Subpoenas</u>

1. Are there any new trends or policies with respect to the issuance or enforcement of investigative subpoenas?

There are no new trends or policies with respect to the issuance or enforcement of investigative subpoenas. The following table shows the use of investigative subpoenas by the Regions during FY 2014 where Regions issued 1,181 subpoenas (735

subpoenas ad testificandum and 446 subpoenas duces tecum) in 576 cases. This total constitutes approximately 2.8 percent of the 20,415 charges filed during this fiscal year.

Region	# Cases	AT	DT	Total	Merit	Non-Merit	Other	Petition to Revoke	Enforced
1/34	32	12	25	37	15	12	3	5	1
2	25	29	14	43	11	7	7	6	0
3	10	22	7	29	7	2	1	0	0
4	17	20	23	43	9	8	0	0	0
5	39	48	14	62	17	19	3	5	3
6	19	16	15	31	9	7	3	2	0
7	20	28	14	42	14	3	3	2	1
8	15	22	9	31	7	5	2	4	0
9	23	57	15	72	12	9	2	0	3
10/11	22	32	13	45	12	8	2	5	0
12/24	14	3	21	24	9	4	1	4	4
13	24	55	22	88	16	6	2	13	2
14/17	15	18	8	26	9	4	2	0	0
15/26	46	82	18	100	28	18	0	11	4
16	38	66	21	87	17	17	4	0	0
18/30	21	28	14	42	15	4	2	3	0
19/36	21	23	23	46	15	4	0	0	0
20	11	18	14	32	6	5	0	2	1
21	23	25	27	52	13	4	6	3	1
22	28	18	31	49	15	10	3	2	1
25	11	6	8	14	6	3	2	0	0
27	6	8	2	10	4	2	0	0	0
28	16	29	9	38	14	1	1	4	1
29	11	1	13	14	6	2	3	9	3
31	22	9	21	30	12	3	7	2	2
32	47	103	45	148	12	18	19	29	0
Totals	576	735	446	1181	310	185	78	101[2]	27

2. Practitioners report significantly different practices between Regions in the use of investigative subpoenas. Practitioners from one Region report that the Region uses them almost exclusively for obtaining documents from third parties, or testimony from reluctant employee witnesses. Other Regions use them much more frequently to gather evidence from a respondent. Is there any direction from the GC as to the use of investigative subpoenas in these circumstances?

Pursuant to Memorandum GC 00-02, Regions have authority to issue investigative subpoenas ad testificandum and duces tecum to charged parties and third-party witnesses "whenever the evidence would materially aid in the determination of whether a charge allegation has merit and whenever such evidence cannot be obtained by

[2] As petitions to revoke often seek to revoke a number of subpoenas, the numbers in this answer are different from those set forth in the response to I.A.5.

reasonable voluntary means." The only limitation on this discretion is when the Region seeks to issue the subpoena post-complaint or when a serious claim of privilege is likely to be raised. In those situations, Regions must submit such requests to Headquarters. See CHM Section 11770, et seq.

3. Has the Board increased its reliance on investigative subpoenas as a tool at the investigative stage?

There has been no change in the extent to which the Agency relies on subpoenas as a tool at the investigative stage. The number of investigative subpoenas issued as a percentage of total charges filed has remained relatively constant over the past few years. Specifically, the percentages are as follows: 2.8% in FY 2014, 3.4% in FY 2013, 3.1% in FY 2012, 3.0% in FY 2011 and 2.8% in FY 2010.

4. Are there established criteria for determining when an investigative subpoena might be warranted? How does the Board handle noncompliance if the subpoenaed party claims the Board is circumventing the "no discovery" aspect of litigation before the Board?

The criteria are described in Memorandum GC 00-02 and CHM Section 11770, et seq. If a party fails to comply with a subpoena, a Region will evaluate the appropriateness and efficacy of enforcement. Generally, claims that the Agency is circumventing the "no discovery" aspect of litigation are raised in a petition to revoke the subpoena or during enforcement proceedings, and are addressed in due course by the Board or District Court.

F. **Access to Information**

1. Public Access to Information: For some ULP cases, the website lists the case number and employer name only. A user must file a FOIA request to obtain additional information regarding the case. What is the basis for this practice? Are there plans to list more information on the website and eventually move to a system more like the federal court PACER system?

The Agency continues its efforts to address the needs of the user community by providing links to a greater number of public documents directly from a case page on our internet site, www.nlrb.gov Many pre-hearing documents require review and redaction, of personal identifying information typically, before they are appropriate for release under the FOIA or for posting on our public website. The Agency is providing resources needed for review, redaction and publishing of relevant information on every case page and is working with our OCIO to determine whether technological tools may assist sufficiently in this endeavor.

2. Party Access to Information: Has the Board considered updating the NxGen system to provide automatic electronic notification to counsel for parties?

Parties who register for the Agency's "E-Service" notifications will receive, immediately upon posting of the Board's daily E-Docket on its website, an e-mail constituting formal notice of the Board's or Administrative Law Judge's (ALJ) decision and an electronic link to the decision. Further, when documents are electronically filed in a case, the NLRB sends a courtesy e-mail notification to other parties in the case who have registered to receive electronic service of Board and ALJ Decisions. The e-mail with a link to the documents is a courtesy notification only; it does not constitute service of the document by the filing party pursuant to Board's Rules and Regulations Sections 102.114(a) or 102.114(i). In addition, this e-mail indicates only that the document has been e-filed with the Agency. It does not constitute a determination that the document has been accepted by the Agency as meeting the requirements for filing.

G. Advice Memoranda

Are there plans for issuing additional advice memoranda regarding employer work-rules, social media rules, handbooks or other areas?

The Division of Advice continues to consider cases, and will continue to issue memoranda, regarding the legality of employer work rules, social media rules, and other employer handbook provisions. In response to requests from practitioners for further guidance in this regard, the General Counsel will be issuing another report in mid-March, which will include examples of rules that were determined to be unlawful and rules that were determined to be lawful over the course of the past few years. See, Memoranda OM 12-59, 12-31 and 11-74.

H. Noel Canning

1. What is the General Counsel's policy on authorizing complaints and placing before the Board theories of violations contained in cases invalidated by the *Noel Canning* decision?

It is our view that the cases in which the Board endorsed the General Counsel's theory when the Board didn't, according to the Supreme Court's *Noel Canning* decision, have a validly appointed quorum, were soundly reasoned and that the current Board should adopt the reasoning in those decisions as its own, such as the decision in *Alan Ritchey, Inc.*, 359 NLRB No. 40 (2012). Thus, we are authorizing complaints and urging the Board to adopt the reasoning set forth in these cases. An example of a case in which we succeeded in having the reconstituted Board largely adopt the reasoning of the Board whose quorum was invalidated by *Noel Canning* is *Tortillas Don Chavas*, 361 NLRB No. 10 (2014), which concerns making discriminatees whole for the adverse tax consequences that result when they receive a backpay award in a year other than the year in which the income would have been earned had the Act not been violated.

2. Please provide an update on the status of cases affected by *Noel Canning*. Has the result changed in any of the cases that have been reconsidered?

The current Board has thus far issued new decisions in over 65 percent of the cases before it as a result of the decision in *Noel Canning*. The remaining cases are in various stages of the deliberative process or have been settled, dismissed, or withdrawn. The result changed in one of the cases that were reconsidered. Further, of those that were reissued, 37 are in the enforcement process. There are less than 30 cases that are still pending before the Board.

I. Time Targets

1. Are there changes in targeted time to schedule ALJ hearings?

The complaint to hearing median remains 100 days.

Are there time targets for ALJ decisions?

In 1995, the Board adopted the following time target goals for ALJ decisions: For cases under 500 transcript pages, decisions should be issued within 60 days of receipt of briefs; for cases from 500-1000 transcript pages, decisions should be issued within 90 days of receipt of briefs; for cases of over 1000 transcript pages, the targeted issue dates is decided between that ALJ and the Chief ALJ in that Division. In addition, there is an overall goal to issue at least 50% of all decisions within 90 days of the close of hearing and within 45 days of receipt of briefs or other submissions. In FY 2014, that goal was met.

2. What is the impact, if any, of time targets on C case dismissals? Is the GC aware of any cases being dismissed because of time targets? If so, has there been any consideration of changing the time targets to allow the Regions more time to investigate charges in order to avoid unnecessary appeals of dismissals that might not have been granted if there was additional time to investigate? Has there been any consideration of providing the Region with more tools (other than more time) to avoid unnecessary appeals?

Time targets have no discernible impact on C case dismissals and we are not aware of cases being dismissed because of time targets. The Impact Analysis Program is reviewed periodically to determine if modifications to standards for case disposition are warranted. The most recent modifications to case time targets and overage allowances were implemented October 1, 2014. These modifications demonstrate a slight loosening of the time targets. The current time frames for case disposition are as follows:

Category III - 7 weeks
Category II - 11 weeks
Category I - 14 weeks

These new standards represent additional percentage points allowable for Category III overage C cases (the standard had been 8% and is now 10%) and an additional two weeks for the processing of Category I cases. The overage allowances allow for additional time to investigate charges in the more difficult cases and ensure consistent quality case processing. Further, charges alleging isolated 8(a) (1) conduct or refusal to provide information in a situation where the refusal does not impact bargaining have been re-categorized from Category II to Category I.

The Agency experienced a considerable decrease in Regional staffing levels because of high attrition and hiring limited to critical positions due to budgetary shortfalls, delays in receiving funding, and the sequestration order. Once the budget situation stabilized somewhat early in FY 2014, hiring in the field was made a priority to provide Regional offices with the needed resources to investigate and process cases, and specifically, Regional offices were authorized to hire over 100 Board agents.

3. Are there any time targets once a matter is submitted to Advice?

The primary time target for cases submitted to the Division of Advice is that they be processed in a median timeframe of 25 days or less.

J. **Handbooks**

1. Is there a uniform policy on requesting employers to produce entire employee handbooks when a pending charge pertains to only certain provisions of the handbook?

Yes, when documents, such as employee handbooks and/or work rules are relevant to an investigation, Regions are instructed to obtain copies of these documents, rather than relying on excerpts that the parties may have submitted.

2. When the Region is reviewing a charge alleging that a specific provision of an employee handbook is unlawful, does the Region affirmatively look for other potentially unlawful provisions?

No, but, if in examining such documents to investigate alleged violations, the Region notices unalleged provisions that may be facially unlawful, Regions are instructed to bring this potential issue to the attention of the Charging Party, who may amend the charge or file a new charge alleging that the previously unalleged rules are overbroad, discriminatory or otherwise unlawful. This notification to the Charging Party is part of the Agency's statutory duty of protecting employees from being subject to work rules that violate the Act by prohibiting engaging in Section 7 rights.

3. Is there a policy to address different Regions issuing complaints on different aspects of a national employer's handbook?

Yes, from time to time, cases filed in multiple Regions that have a nationwide impact, such as those where a national employer's handbook is at issue, are coordinated

through Operations Management's oversight to ensure consistent casehandling and decision-making.

4. What latitude do the Regions have in providing compliance advice regarding handbook and other employer rules that have been subject to investigation and complaint?

Typically, Regional Directors will simply direct employers to rescind the unlawful rule since, as you know, the Agency does not render advisory opinions in its normal course of doing business. There have been occasions when an employer wishes to modify a rule found to be unlawful and seeks the Region's guidance. However, while Regions may provide recommendations, more often than not, they will be reluctant to do so because they can offer no guarantee that the modified rule, when read in context or as applied, will pass muster if an ULP charge is filed, particularly as the Region does not necessarily have the final say since Appeals, Advice and/or the General Counsel may weigh in. That being said, Regions have generally been willing to approve bilateral settlement agreements where modification of an employer's rule is simple and clear cut.

As noted in response to I.G., the General Counsel continues to issue guidance memos about handbook and other employer rules, which are geared to assist employers with making informed decisions, and expects to release another such memo in mid-March. See, Memoranda OM 12-59, 12-31 and 11-74.

5. Are investigators routinely instructed to request employee personnel files and employer handbooks even if those documents are not directly relevant to specific issues raised by the allegations in a charge?

When documents, such as employee personnel files or employer handbooks, appear to be relevant by a Board agent in assisting the Regional Director in making a final determination, such as to assess potential disparate treatment, investigators will routinely seek copies of such documents from the parties.

K. **Witness Interviews**

1. Are there policies or best practices concerning when Board agents should travel to meet with witnesses?

The Agency's policy regarding Board agent travel is predicated upon the importance the Agency places upon taking face-to-face Board agent-prepared affidavits from witnesses. CHM Section 10054.2(a) provides:

In Category II and III cases, the preferred method of obtaining affidavits is through a face-to-face meeting. On the other hand, in Category I cases where the issues are generally more straightforward, telephone affidavits may be appropriate.

Thus, in Category II and III cases, and some Category I cases where eyewitness testimony is necessary, the Agency will make every possible effort, whether that entails Board agent travel or travel by parties or witnesses to the Regional office, to effectuate a face-to-face meeting with cooperative witnesses.

Alternative investigative techniques, including the use of telephone affidavits or questionnaires in certain cases, such as those alleging a refusal to furnish information or a breach of the duty of fair representation, those that rely almost solely on documentary evidence, or those where there is a very high probability that the case has no merit based upon the face of the charge, may be utilized.

As to whether the burden of traveling should be borne by the Board agent or the individual giving the affidavit, there is no general Agency policy requiring parties to travel to the Regional office to present evidence. However, providing evidence at a Regional office often provides certain advantages, including the availability of copy machines and scanners, as well as a reduction in the Agency's travel costs. Institutional Charging Parties are often encouraged to travel to the field office to present evidence and give affidavit testimony if they are located within 120 miles of it. However, Regional Directors are sensitive to the hardship such a requirement might impose on certain parties. Charged Parties and their witnesses located within a reasonable distance are also strongly encouraged to travel to the field office. If the Charged Party is unwilling to provide affidavits, the Agency generally will not be willing to incur significant travel costs to travel to the Charged Party's facility due to severe budgetary constraints, instead requesting video conference interviews and a position statement.

2. Other than distance, does the Agency consider the potential witnesses' means and ability to travel to the Regional Office, work schedule, or any other factors? If so, are those factors published anywhere?

Yes, it does. CHM Section 10054.3(a) specifically provides that Board agents should schedule interviews with cooperative witnesses at a "mutually convenient time and place." Board agents are sensitive to whether witnesses possess the means and ability to travel, their work schedules, and any other issues. In certain cases, where an individual has traveled a substantial distance to speak to an Information Officer and file a charge, the Information Officer will take an affidavit from the individual during his or her visit to save both the witness and the Agency the time and expense of additional travel.

CHM Section 10012.6 provides that in appropriate circumstances, the Board agent serving as Information Officer or another Board agent should take an affidavit from available Charging Party witnesses at the time a charge is filed in order to expedite processing the case. Such circumstances include:

- The witness has traveled a substantial distance to the field office
- The witness will be otherwise unavailable for a considerable period of time
- The nature of the charge requires immediate investigation

Further, CHM Section 10064.3 provides additional guidance concerning appropriate locations for interviews when Board agent travel is necessary. It advises that the site of interview should:

- Maximize privacy
- Enhance cooperation
- Avoid locations where employees might be unlikely to provide full and candid testimony, e.g., Charged Party's facility
- Avoid circumstances which could result in the interview being used as a pretext for a general employee or membership meeting
- Provide a safe and appropriate environment for Board agents and witnesses

Additionally, the Region may coordinate investigations in a particular area, such that a Board agent may be assigned to travel to and collect affidavit testimony and documents in a number of active cases where witnesses are in close proximity to one another.

Lastly, if some witnesses are located within another Region's geographic area, that Region's Board agent will be asked to assist in collecting affidavit testimony and documentary evidence.

3. Has the Agency considered expanding the use of videoconferencing (in any form) to accommodate witness interviews?

Yes it has, but the Agency still believes that face-to-face affidavits are preferable. Our experience has been that the investigator is able to develop a better rapport with affiants if the communication is in person. In addition, in person contact lends itself more to expanding the discussion with follow up questions relevant to a complete investigation. We have used videoconferencing from time to time to facilitate an investigation and even that is not as satisfactory as face-to-face contact. At this point the technology does not yet replace the personal contact provided when two people sit down together.

We recognize that the growing availability and potential lower costs of Skype for Business, as well as improvements in videoconferencing, may well lead us to re-evaluate our approach. We specifically acknowledge the virtue of videoconferencing when there are no other practicable means available and we have met with success in using it as a last resort, for example, in order to obtain corroborative trial testimony of a witness in Madrid.

Lastly, as noted in our response to I.K.1, the Agency encourages the use of videoconferencing for interviews of Charged Party witnesses to save on travel expenses when Charged Parties are unwilling to have the testimony reduced to sworn Board agent prepared affidavits.

4. Are investigators routinely instructed to request contact information for all current and former employees in order to protect the identity of the potential witness they wish to contact?

No, but Regions have requested this information in cases where it deems it appropriate. The Agency places a high emphasis on conducting thorough investigations, and will reach out to neutral witnesses, including co-workers, to see whether they corroborate allegations that come to light during the investigation. When corroborative testimony from employees is necessary, Regions have access to a number of sources to reach out to them and tap into those resources. Sometimes, an employer is requested to provide such information as it is not often readily available through other sources. When this is done, the recommended practice is to design the request for information in a manner that does not reveal the identity of the witness or witnesses that the Board agent intends to contact. For example, the Board agent may ask for the contact information of all or a subset of the workforce thereof. The breadth of that request often depends upon the size of the operation and the number of witnesses that the Region believes it needs to contact.

L. Jurisdiction

1. How is the General Counsel handling questions related to jurisdiction over airport vendors or other employers that might qualify as "derivative carriers" under the Railway Labor Act?

In *Federal Express Corporation*, 317 NLRB 1155 (1995), the Board held that when a claim of arguable Railway Labor Act (RLA) jurisdiction is raised, and where the jurisdictional issue is sufficiently doubtful, "particularly where there are very difficult questions of interpretation under the RLA," the jurisdictional question may be better addressed by the National Mediation Board (NMB). Thereafter, we found that it became an almost automatic response of many Regions to refer cases involving airline contractors to the NMB – often with little or no independent investigation by the Region.

As a result, the current General Counsel reminded Regions that they must take a closer look at the jurisdictional issues before referring our unfair labor practice cases to the NMB. In response, in order to make an informed decision on referral, as well as to insure that the NMB, when requested, has sufficient evidence to expeditiously render an opinion, Regional offices are required to investigate questions of jurisdiction under the RLA, just as they would any investigation where jurisdiction is in question. Thus, these investigations will thoroughly probe the relationship between the air carrier and the Charged Party.

2. How does a Regional office determine whether to assert jurisdiction over an unfair labor practice case involving potential jurisdiction under the Railway Labor Act? Are these cases routinely referred to the Division of Advice? Why or why not?

CHM Sections 11711.1 and 11711.2 provide guidance in cases involving potential jurisdiction under the RLA. Section 11711.1 states that if it is clear that the NLRB has

jurisdiction over the employer, the Regional Office should proceed with the processing of the case. Conversely, if it is clear that the employer falls under the jurisdiction of the RLA, the parties should be referred to the NMB. As noted in the previous response, if there is sufficient doubt as to which agency has jurisdiction, it is the Board's practice to refer those cases to the NMB for an advisory opinion on the jurisdictional issue. These cases are not routinely referred to the Division of Advice because they generally do not present novel legal issues that require guidance from Advice.

3. If an employer is willing to stipulate to the Board's jurisdiction, is a completed Commerce Questionnaire required? Why or why not?

A completed Commerce Questionnaire is not always required. CHM Section 11702.1 specifically provides that, as "an alternative to the Commerce Questionnaire, the Regional Office may, where appropriate, accept a written stipulation of facts establishing Board jurisdiction."

M. **General Case Processing Issues**

1. Under what circumstances will the Board rescind a decision? If rescinded, what notice will the Board give parties regarding the reasons for the decision?

We have been advised that you no longer have an interest in a response to this question.

2. Where charges involve conduct occurring in more than one Region, is there a policy as to which Region(s) should do the investigation? Does the General Counsel ever encourage one Region to defer to the decision of another Region?

There is no general policy. Where a single charge is filed that involves conduct by the Charged Party occurring in more than one Region, the Regions normally confer to determine which is in the best position to handle the charge effectively and efficiently. If appropriate, the charge will be formally transferred from the Region where it was filed, see CHM Section 11712-11714, or Regions will provide assistance to the investigating Region as noted in our response to I.K.2. Where many charges against the same respondent involving the same or similar conduct are filed in multiple Regions, the General Counsel may decide that the cases should be coordinated through Operations-Management where one Region is assigned as the lead Region tasked with collaborating with and reviewing other Regions' preliminary determinations in all cases to ensure context is considered and consistent results are rendered.

3. Will there be a uniform approach to the handling of *D.R. Horton* cases, *i.e.*, whether to proceed on a stipulated record before an administrative law judge or on a summary judgment motion to the Board or otherwise?

Each pending *D.R. Horton* case will be considered individually and the approach taken will be based on the specific circumstances presented by the case as there are many unique factors, such as opt in or opt out clauses.

4. How frequently are Regional Directors using their ability to make a merit dismissal (for example, where the employer self-remedies an independent 8(a) (1) violation or where it rescinds discipline)?

While the Agency does not keep statistical data as to the basis for the merit dismissal determinations, of the estimated 4800 charges dismissed in FY 2014, 267 were merit dismissals.

5. Does the Agency have an established set of best practices for casehandling other than the Casehandling Manuals? Are they publicly accessible?

The primary source of the Agency's case processing practices is the Board's Rules and Regulations. The CHMs (ULP, Representation Case, and Compliance), which are updated periodically, compile the Agency-wide accepted and recommended procedures and practices for implementing the Board's Rules and Regulations. These are supplemented by Memoranda from the General Counsel and Operations-Management, which address specific issues and provide guidance based on changes in Board law, and are publicly available on our website.

6. If not, given the differences in how the different Regions operate and how agents within a given Region might approach casehandling, is there any plan to create a best practices memo or manual?

The CHMs combined with outstanding Memoranda from the General Counsel and Operations-Management incorporate the Agency's best practices for processing charges and petitions and should be followed by Regional offices.

7. Does the General Counsel have a policy regarding assignment of Board agents to investigations involving the same parties?

Our recommended practices regarding the assignment of cases are set forth in CHM Section 10022, which does not specifically provide that Board agents should be assigned to cases involving parties with whom they have worked in the past. However, among the factors set forth in Section 10022 is "familiarity with the background of the case." Thus, Regions often make case assignments by taking into account whether a Board agent has worked on related cases involving the parties and is familiar with the background of the case, thus saving time and resources because s/he does not need to learn basic facts anew.

8. Are there instances where investigators are instructed to request evidence from a charged party prior to receiving evidence from the charging party or establishment of a *prima facie* case?

The Agency policy is to conduct high quality investigations and resolve them as expeditiously as possible. Typically, Regions obtain substantial relevant evidence from the Charging Party before contacting the Charged Party to receive its evidence. There are occasions where, after obtaining a preliminary understanding of the allegations from the Charging Party, the Board agent will reach out to the Charged Party, broadly describe the Charging Party's allegations, request the Charged Party to submit a statement of position, and seek, in appropriate cases, to schedule interviews with Charged Party witnesses.

As set forth in CHM Section 10052.5: Early contact with the Charged Party frequently leads to a prompt resolution of the charge, which experience has shown is beneficial to all parties and is in the public interest. Thus, prompt determination of a non-meritorious charge ends the dispute in a cost effective and efficient manner, without the need for a protracted investigation. On the other hand, prompt determination of a meritorious charge provides an opportunity for a timely remedy before resolution becomes more costly or more difficult.

9. Are all e-mails automatically part of the case file?

Yes. All communications by parties and their representatives related to a case, whether by mail, email, telephone, or face-to-face, are to be included in our case file. As to email communications, Board agents manually upload these into the NxGen case file.

10. Is there a policy or practice regarding notifying parties of the intent to advance a novel theory of law or seeking a change in the law?

CHM Section 11750.1 states that certain issues warrant review before the General Counsel through the Division of Advice. This section notes that periodically, the Office of the General Counsel issues a memorandum instructing Regional management to submit to the Division of Advice certain legal issues that the General Counsel wishes to consider. The most recent Mandatory Submissions to Advice, Memorandum GC 14-01, which is available to the public on our website, provides guidance about those cases of interest to the current General Counsel. This same CHM Section also informs Regional Offices that they should notify the parties that the case is being submitted to the Division of Advice and the specific issue(s) involved. If the parties have not submitted a position statement regarding those issues, they are to be invited to promptly do so.

II. Remedies

1. In *HTH*, 361 NLRB No. 65, the Board discussed the possibility of awarding front pay in lieu of reinstatement but did not award it in that case and did not decide whether it had the authority to do so. Are there any pending cases in which the issue is before the Board? Are there any opinions from Advice on this issue?

To date, there have been no post-*HTH* submissions where Advice has recommended seeking such a remedy. Further, there are no cases presently pending before the Board where the General Counsel is seeking an award of front pay; however, there is a case before an ALJ where we are seeking a front pay remedy for an employee who was intentionally injured by a supervisor and is unable to work.

2. Is there guidance on when to seek remedies such as an explanation of employee rights, an award of litigation costs, electronic postings, notice reading, and similar remedies? Are there statistics available on the use of these remedies?

Yes, there is guidance on seeking remedial relief. Such guidance may be found in the Agency's ULP and Compliance Casehandling Manuals, as well as in the following memoranda available to the public on our website:

Memorandum GC 14- 01 Mandatory Submissions to Advice; Memorandum GC 11-13 Guideline Memorandum Concerning Parties' Obligation to Provide Information Related to Assertions Made in Collective Bargaining - Information Requests - Inability to Pay and Other Financial Assertions by Employer in Bargaining; Memorandum OM 13-41 *Latino Express* Remedies; Memorandum GC 13-02 Inclusion of Front Pay in Board Settlements; Memorandum OM 11-61Financial Remedies and Other Settlement Terms; Memorandum GC 11-08 Changes to the Methods Used to Calculate Backpay in Light of *Kentucky River Medical Center* and to Better Effectuate the Remedial Purposes of the Act; Memorandum GC 11-07 Guideline Memorandum Regarding Backpay Mitigation; Memorandum GC 10-07 Guideline Memorandum Regarding Effective Section 10(j) Remedies for Unlawful Discharges in Organizing Campaigns; OM Memo 07-57 Addressing Requests to Introduce Newly Discovered Evidence or Evidence of Changed Circumstances Affecting Affirmative Remedial Orders of Reinstatement

The Agency does not keep statistics on these remedies.

3. What is the typical method by which compliance is established without a compliance hearing? What is the Board's policy on providing the affirmation to the charging party?

The NLRB tries to obtain compliance at every stage of a case and has established procedures to guide Board agents as set forth in the Compliance Casehandling Manual (CCHM). See, in particular, Sections 10504, 10506, 10508, 10595, 10596, 10598, 10514, 10516, 10518, 10520, 10521, 10522, 10525, 10526, 10528, 10530, 10532,

10534, and 10536 through 10668. See also, Memoranda GC 11-08, GC 11-07, OM 09-58, OM 05-12, and OM 98-12.

While there are specific procedures related to the nature of the relief in question, the Regions, usually through their Compliance Officer, will send out a letter detailing the steps to be taken, with deadlines, and if appropriate the number of notices and any other requirements needed for full compliance. The Compliance Officer will work with the Charged Party or their representative to obtain compliance with any settlement, ALJ decision, or Board or Court order. Once s/he receives affirmation from the Charged Party or its representative that the compliance obligation has been met, the Compliance Officer will so advise the Charging Party, who is given an opportunity to challenge the Charged Party's assertion.

4. Are there plans to continue or expand upon the prior General Counsel's initiative regarding special remedies?

The General Counsel has the discretion to argue and pursue the expansion of appropriate remedial relief in order to effectuate the purposes of the Act and is interested in creative ways to ensure that statutory violations are appropriately remedied.

The General Counsel recently issued Memorandum GC 15-03 Updating Procedures in Addressing Immigration Status Issues that Arise during ULP Proceedings. In that memorandum, he advises that, in meritorious cases where immigration status issues may impact the Agency's ability to remedy or litigate a potential ULP violation, the Agency will consider whether additional remedies should be sought to address the potential limitations on backpay and reinstatement that may arise in compliance. Remedies that will be considered include: notice reading, publication of notices, training for employees about their statutory rights, training for managers and supervisors about their obligations under the statute, *Gissel* bargaining orders, union access to employee contact information, reimbursement of organizing or bargaining expenses, consequential damages, instatement of a qualified referred candidate, and other appropriate remedies.

That same Memorandum also discusses considering whether to: seek deferred action, U-visas or T-visas, and whether to certify or facilitate that process; refer the case to the Department of Justice's Office of Special Counsel for Immigration-Related Unfair Employment Practices pursuant to our Memorandum of Understanding with that entity; and engage with the Department of Homeland Security, ICE in particular, regarding their enforcement operations.

5. In a recent case, the union (not the General Counsel) requested the remedy of an award of bargaining expenses. Will the General Counsel routinely request the remedy of bargaining expenses in bad faith bargaining cases, or is it the burden on the charging party to request its bargaining expenses as a remedy?

Memorandum GC 14-01 requires the Regions to submit cases to the Division of Advice where reimbursement of bargaining expenses or of litigation expenses might be appropriate. This is a continuation of previous initiatives by the Office of the General Counsel. See, Memoranda GC 06-05; GC 07-08; and GC 11-06. The relief may be requested by the Charging Party or *sua sponte* by the Regional Director, when the Regional Director believes such relief may be appropriate.

We note that the award of bargaining expenses is not new. In *Frontier Hotel & Casino*, 318 NLRB 857 (1995), enfd. in relevant part sub nom. *Unbelievable, Inc. v. NLRB*, 118 F.3d 795 (D.C. Cir. 1997), the Board considered whether bad-faith bargaining warranted the reimbursement of negotiation costs and determined that the unusually aggravated misconduct warranted an order requiring the respondent to reimburse the charging party for negotiation expenses both to make the charging party whole for resources that were wasted because of the unlawful conduct, and to restore the economic strength that is necessary to ensure a return to the status quo ante at the bargaining table. See also *Dish Network Service Corp.*, 347 NLRB No. 69, slip op. at 2, 30 (2006) (quoting *Frontier Hotel & Casino*, 318 NLRB 857, 859 (1995), enfd. in relevant part 118 F.3d 795 (D.C. Cir. 1997) (awarding bargaining expenses)); *Regency Service Carts*, 345 NLRB 671, 676 (2005) (financial losses union incurred in negotiations were "directly caused by [employer's] strategy of bad-faith bargaining"); *Teamsters Local 122 (August A. Busch & Co.)*, 334 NLRB 1190, 1195 (2001), enfd. 2003 WL 880990 (D.C. Cir. 2003) (citing *Frontier Hotel & Casino*, 318 NLRB at 859) (consent judgment); *Modern Mfg. Co.*, 292 NLRB 10, 10 n.4, 23 (1988) (reimburse employee negotiators where totality of circumstances demonstrated employer had no intent of reaching agreement, including insisting on maintaining absolute discretion and control over every important economic term); *M.F.A. Milling Co.*, 170 NLRB 1079, 1080 (1968), enfd. 463 F.2d 953 (D.C. Cir. 1972) (course of conduct designed to frustrate bargaining and make negotiations a "fruitless waste of time," including negotiators lacking sufficient authority to meaningfully bargain, breaking off negotiations for four months, and withdrawing tentative agreements); *Preterm, Inc.*, 240 NLRB 654, 656, 676 (1979), supplemented 273 NLRB 683 (1984), enfd. 784 F.2d 426 (1st Cir. 1986) (reimburse employee negotiators where employer violations included refusal to meet with union on several occasions, unreasonably delaying provision of certain information, persistent refusals to negotiate over economic issues); *Sivalls, Inc.,* 307 NLRB No. 154, 140 L.R.R.M. 1209 (1992).

6. Is there a case pending before the Board on the General Counsel's position that interim expenses are separately awardable and no longer an offset to interim earnings?

Compliance officers have routinely calculated backpay so that interim expenses are separately awardable and the Board has approved backpay calculations of this sort. Memorandum GC 15-01 advises Regions that this should be pled specifically in the initial complaint.

7. In a non-10(j) case, what is the average length of time for an alleged discriminatee to obtain a final reinstatement order? What percentage of discriminatees who are awarded reinstatement actually return to work?

The Agency does not keep statistics on the length of time for an alleged discriminatee to obtain a final reinstatement order.

For FY 2015 thus far, 348 out of 633 discriminatees, or 54.98%, refused reinstatement and 45.02% returned to work. In FY 2014, 865 out of 2375 discriminatees, or 36.42%, refused reinstatement and 63.58% returned to work.

III. Representation Cases

A. Statistics

1. Please provide statistics concerning the number of RC and RD petitions filed, the number of elections conducted in each category, and the union win rate.

In FY 2014, as to RC petitions, 2053 were filed, 1260 elections were held, and a certification of representation issued in 857, which is a union win rate of 68%. Regarding RD petitions, 411 were filed, 180 elections were held, and the union remained certified in 60, which is a union win rate of 33%.

2. Please provide statistics concerning the median number of days from petition to election, as well as statistics on cases that took longer than the median.

In FY 2014, the median days from petition filing to election was 38 days and the percentage of elections conducted within 56 days of petition filing was 95.7%.

3. Please provide statistics concerning the average unit size sought in RC petitions and the average unit size determined to be appropriate. How do these statistics compare to the years before *Specialty Healthcare*?

In FY 2014, the median size of bargaining units sought in RC petitions was 25 employees and the median size of bargaining units determined to be appropriate in RC petitions was 24. These numbers are consistent with those in years prior to the issuance of the *Specialty Healthcare* decision.

4. Please provide statistics concerning the use of mail ballots and the holding of off-site elections. Have mail ballot elections increased? Have the standards for mail ballot elections changed?

During FY 2014, the Agency conducted a total of 1687 initial and re-run elections. Out of that total, 191 were mail ballot elections and 12 were mixed manual/mail ballot elections. During FY 2013, the Agency conducted a total of 1,620 elections. Out of that total, 172 were mail ballot elections and 14 were mixed manual/mail ballot elections.

The Agency does not maintain statistics on the holding of off-site elections and there have been no changes to the standards for mail-ballot elections.

5. Are there time targets for UC petitions?

There are no specific time targets for UC petitions; however, all petitions are given a high processing priority and are to be expeditiously handled.

B. Election Rules

1. What is the status of the implementation of the new election rules, including training and public outreach?

We are planning to have a training conference for field personnel March 17 through March 20. Regional offices expect to conduct public outreach training between March 23 and April 13 in their respective geographic areas. Prior to April 14, the rule's effective date, we expect to make available to the public on our website, the following information: a guidance memorandum regarding representation case procedure changes; frequently asked questions about the changes; and new forms to be utilized, such as the petition form and the statement of position form.

2. Are there any other rules being considered or drafted?

Not at this time.

3. What qualifies as "good cause shown" for granting an extension for the hearing date?

"Good cause" is not the standard for granting an extension of the hearing date. Section 102.63(a) provides that the standard is "special circumstances" for a postponement of up to two business days and "extraordinary circumstances" for a postponement of more than two business days.

4. Specific questions about the new rules:

a. Will the Regions have the discretion to allow a brief postponement of a hearing if counsel or essential witnesses are truly unavailable?

Yes. Section 102.63(a) of the final rule provides that the Regional Director can grant a postponement of up to two business days upon request of a party showing "special circumstances."

b. Will the Regions allow video conference testimony?

Videoconference testimony is not a subject covered by the final rule. Regions were provided guidance regarding video testimony in representation cases in Memoranda OM 11-42 and 08-20. As explained in Memorandum OM 08-20, there is a strong preference for hearings in which all parties, witnesses, and the hearing officer are located in the same hearing room. Nonetheless, there may be circumstances that would warrant the use of video testimony, and Regional Directors have the discretion to decide on a case-by-case basis whether there are compelling special circumstances demonstrating "good cause" warranting the use of video testimony. In exercising this discretion, the Regional Directors should look at factors, such as: (1) the availability of the participants and proximity of the participants to the hearing site; (2) the adequacy of the available videoconferencing facilities and any technological issues; (3) the anticipated length and scope of the hearing; (4) the number, length, and types of documents likely to be introduced as evidence; (5) the number of witnesses who would testify by video and the expected length of their testimony; (6) the types of issues the testimony addresses; (7) the potential cost of using video testimony versus travel costs; and (8) the positions of the parties.

c. Should the preliminary voter list include both the petitioned-for group and any other group the employer seeks to include? If so, will the list identify which unit the employees are in?

Yes. Section 102.63(b)(1)(iii) provides that, in a RC case, the employer's statement of position shall include a list of the full names, work locations, shifts, and job classifications of all individuals in the proposed unit, as of the payroll period preceding the filing of the petition, who remain employed at the time of filing, and if the employer contends that the proposed unit is inappropriate, the employer **shall separately list** the full names, work locations, shifts, and job classifications of all individuals that the employer contends must be added to the proposed unit to make it an appropriate unit. The employer shall also indicate those individuals, if any, who it believes must be excluded from the proposed unit to make it an appropriate unit.

d. Should the final voter list include both the names of employees in the unit directed by the Regional Director and the names of employees from any other group sought by the Petitioner or Employer? If so, will the list identify which unit the employees are in?

Section 102.67(l) provides that the employer shall provide to the Regional Director and the parties a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cellular ("cell") telephone numbers) of all eligible voters. The employer shall also include in a separate section of that list the same information for those individuals who, according to the direction of election, will be permitted to vote subject to challenge.

e. What will be the criteria used for deferring unit issues, including supervisory issues, to post-election proceedings? Will there be a numerical standard, and, if so, what is it?

The final rule does make clear that, while the Regional Director must determine that a proposed unit is appropriate in order to find that a question of representation exists, s/he can defer litigation of individual eligibility and inclusion issues that need not be decided before the election. The Board did not adopt the numerical standard proposed in the NPRM that would have required the hearing officer to exclude evidence concerning, and the Regional Director to defer deciding, individual eligibility or inclusion questions involving less than 20 percent of the unit. Thus, no specific numerical standard is provided in the rule for deferral of individual eligibility and inclusion issues as that is left to the Regional Director's discretion. The Board did note that it believed Regional Directors' discretion would be exercised wisely if Regional Directors typically chose not to expend resources on pre-election eligibility and inclusion issues amounting to less than 20 percent of the proposed unit.

f. Will the Region open or impound ballots if there are unit issues deferred to post-election?

If a ballot is cast by an individual, who is permitted to vote subject to challenge in the direction of election, the ballot will be handled in the same manner as before the adoption of the final rule. Specifically, if the ballot is not determinative of the election results, it will not be opened. If the ballot is determinative, it will be handled by a post-election proceeding or report with other determinative challenged ballots.

g. Will the same blocking charge policy apply?

No. Section 103.20 has been revised to set forth a new blocking policy which provides that whenever any party to a representation proceeding files an unfair labor practice charge together with a request that it block the processing of the petition to the election, or whenever any party to a representation proceeding requests that its previously filed unfair labor practice charge block the further processing of a petition, the party must simultaneously file, but not serve on any other party, a written offer of proof in support of the charge. The offer of proof must provide the names of the witnesses, who will testify

in support of the charge, and a summary of each witness's anticipated testimony. The party seeking to block the processing of a petition must also promptly make available to the Regional Director the witnesses identified in its offer of proof. If the Regional Director determines that the party's offer of proof does not describe evidence that, even if proven, would interfere with employee free choice in an election or would be inherently inconsistent with the petition itself, and thus would require that the processing of the petition be held in abeyance absent special circumstances, the Regional Director will continue to process the petition and conduct the election where appropriate.

h. Will the one (1)-year rule apply where a Petitioner files for a different group that includes some but not all of previous voters? Would that change if there was a different Petitioner?

It appears this question is referring to Section 9(c) (3) of the Act which prohibits holding an election in any bargaining unit or subdivision in which a valid election was held during the preceding 12-month period. The election bar rule was not changed by the final rule.

i. When providing the *Excelsior* list, does an employer have to provide personal email addresses (if available), employer email addresses or both?

The employer does not have to provide employer email addresses, but does have to provide personal email addresses, if available. Sections 102.62 (d) (which deals with election agreements) and 102.67(l) (which deals with directed elections) state that the employer shall provide to the Regional Director and the parties a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cellular ("cell") telephone numbers) of all eligible voters and, in a separate section of that list, the same information is to be provided for those individuals whom the parties have agreed should be permitted to vote subject to challenge or those individuals who, according to the direction of election, will be permitted to vote subject to challenge.

C. **Joint Employer**

1. We were advised that the Regions have been directed to hold all cases involving "joint employer" issues in abeyance pending decisions in *Browning-Ferris* and *McDonald's*. Is this accurate and, if so, how many petitions are currently pending in which this is an issue?

Regions have not been directed to hold representation case petitions involving "joint employer" issues in abeyance pending decisions in *Browning-Ferris* or *McDonald's*.

Thus, in representation cases where the petitioner asserts that two employers jointly employ the petitioned-for employees and seeks a certification naming both employers, each employer is served with a copy of the petition, notice of hearing, information about representation case procedures, and the name and contact information of the assigned Board agent, along with an invitation to communicate with the Board agent if the party has any questions. Both named employers are accorded the rights of parties to the

representation proceeding, including being involved in discussions with the Board agent about narrowing the issues prior to a pre-election hearing or securing an election agreement. Where the petitioner has not asserted a joint employer relationship, but the Region becomes aware that another employer might be a joint employer of the petitioned-for employees along with the named employer, the potential joint employer is an "interested party", who should be served with a copy of the petition and other materials provided to the named employer.

2. In cases involving joint employer allegations, are investigators instructed to consistently communicate with both of the alleged joint employers?

In ULP cases, Board agents, who are assigned to investigate, are advised to accord both alleged joint employers rights as parties to the ULP proceeding. Thus, s/he will seek to obtain all relevant and necessary information from both in order to allow the Regional Director to make an informed decision on the merits. As with representation cases, where a Charging Party has not asserted a joint employer relationship, but the Region becomes aware, during the ULP investigation, that another employer may be a joint employer, it will so advise the Charging Party, and, if a charge is amended or filed alleging that joint employer as having violated the Act, it will be accorded full rights as a party to the investigation.

IV. Miscellaneous

1. Please provide information on the Regions seeking and obtaining U-Visas for undocumented workers whose testimony is necessary in an unfair labor practice case.

From the beginning of FY 2014 to date, three Regional offices forwarded U-visa submissions from advocates requesting certification of employees' U-visa applications for their submission to US Customs and Immigration Services (USCIS). One request was approved, one was denied because there was no showing that the employees were discharged in an effort to prevent protected concerted activity or obstruct NLRB proceedings, and one remains pending as it was just submitted to Headquarters. The Agency is not aware of any action taken by USCIS in response to any of the U-visa applications that it certified to date.

As noted in our response to II.4., the General Counsel recently issued Memorandum GC 15-03 Updated Procedures in Addressing Immigration Status Issues that Arise during ULP Proceedings, which reminds Regions to consider whether to seek deferred action, U-visas or T-visas, and whether to certify or facilitate that process.

2. Please provide an update on the NLRB's agreement with the Justice Department on collaborating in certain employment cases.

Since January 2014, there has been one instance in which an NLRB Regional office has collaborated with the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC) under the 2013 Memorandum of Understanding. Further,

OSC staff conducted a series of web-based trainings for NLRB Regional and Headquarters personnel, and nationwide, in-person training is ongoing.

3. What is the NLRB's policy on conducting unannounced inspections of notice postings at employer locations?

Pursuant to CCHM Section 10518.7, it is appropriate for a Compliance Officer or Board agent to make routine checks of posted notices at the posting site when in the area during the course of other business. Further, where there are specific allegations of noncompliance with the posting requirements, the Compliance Officer's investigation may include an unannounced visit to the respondent's facility to inspect the posting.

4. Will the NLRB post all charges and petitions on its web-site? If not, please explain why not.

Yes, after appropriate redactions are made.

5. What is the status of any cooperation agreement and/or initiative between the NLRB and any other federal agencies?

The NLRB currently has interagency agreements with the following federal agencies:

- Occupational Safety and Health Administration (Memoranda OM 14-77 and OM 14-60)
- Office of Special Counsel for Immigration Related Unfair Employment Practices (Memorandum OM 13-59)
- National Mediation Board (Memorandum OM 90-83)
- Mine Safety and Health Administration (Memorandum GC 80-10)
- Department of Labor, OSHA (Memoranda GC 79-04 and GC 75-29)
- Department of Labor, Wage and Hour Division (Memorandum GC 76-69)

Additionally, in November 2014, President Obama announced a series of executive actions to address the nation's immigration system and directed agencies across the federal government to implement specific elements of these executive actions. One such action was the creation of an Interagency Working Group for the Consistent Enforcement of Federal Labor, Employment and Immigration Laws, in which the NLRB, along with DOL, EEOC, DOJ and DHS participates. The purpose of the Working Group is to identify policies and procedures that promote the consistent enforcement of federal labor, employment, and immigration laws in order to protect all workers in the U.S. Related thereto, we are currently engaging in extensive dialogue with DHS to establish an MOU with ICE to avoid conflicts between our two agencies' law enforcement activities involving individuals with potential immigration status issues.

6. What is the status of allowing the parties to e-file all documents?

Most documents filed under the Board's Rules and Regulations may be filed electronically. Documents that may not be filed electronically are:

- Unfair Labor Practice Charges
- Representation Petitions
- Petitions for Advisory Opinions
- Showing of Interest documents
- A document that is more than twenty (20) megabytes in size

However, when the new election rule goes into effect, representation petitions and related showing of interest documents may be e-filed.

7. Is there a policy requiring new ALJs to have served as ALJs in the Social Security Administration?

No.

8. How frequently is the Board's mediation program being used for cases pending before the Board, and what is its success rate? Are there any plans to expand the program to cases pending in the Regions?

The mediation program is being used about five times a year and the success rate is 50%. We have had discussions with FMCS to expand our current program to potentially include cases pending with Regions and ALJs.

9. The Regions occasionally rely on Advice Memos that are not available to the public because the cases are still pending. Would the Board be willing to provide the parties with a redacted version of such Advice Memos (perhaps after a decision has issued from the ALJ in the pending matter) that would not disclose the parties' identities?

The General Counsel's policy remains to not disclose deliberative process and work product information in meritorious cases that are slated to be or are being litigated. That being said, once a case is closed on compliance, the current General Counsel has directed that "go" Advice memos are to be posted on the Agency's public website, after appropriate redactions are made typically related to personal identifying information, unless there are pending related cases involving that employer.

10. Are there any cases in which Regions have been authorized by the General Counsel to argue for reconsideration of *Spruce Up*?

There are at least 10 cases in which Regions have been authorized to argue for reconsideration of *Spruce Up*. Many of those cases settled or are in the process of settling.

11. Is the Board considering any regulation or other method to notify parties of their right to file a 350-word supplemental brief with the Executive Secretary, consistent with *Reliant Energy*?

No amendment to the Board's Rules and Regulations is presently being considered by the Board. The Board gave notice to the public of its adoption of a policy permitting submission of a letter by a party in a matter pending before the Board, not to exceed 350 words, advising the Board of significant, newly discovered evidence pertinent to the party's case by publication of its order in *Reliant Energy*, 339 NLRB 66 (2003). The Board may consider whether some other form of notice of this policy might be appropriate.

12. Are there any plans for further Regional reorganization?

In February 2012, the Agency began assessing whether to consolidate certain Regional Offices in light of the reduction in case filings, the decrease in the Agency's staffing levels in field offices, the increasing disparity between larger and smaller offices resulting in a lopsided assignment of responsibilities as between one Regional Director and another, and then existing vacancies in Regional Director positions. Any time a Regional Director transfers or announces his/her retirement, the Agency reviews the case intake in that Region, as well as the surrounding Regions, to determine whether Regional consolidation and/or reconfigurations would be beneficial to the Agency and the public it serves. The current General Counsel has directed that this process continue.